

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SHERRON KIRKWOOD,

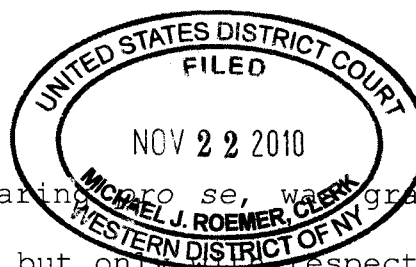
Plaintiff,

-v-

JOSEPH WILKINSON, Z/Sgt.,
GRILLO, Officer, J. BUONO, Inv.,
BARILLARI, Officer,

Defendants.

08-CV-0248Sc
ORDER



Plaintiff, Sherron Kirkwood, appearing *pro se*, was granted permission to file an amended complaint but only with respect to the claim that he was subjected to excessive force during the course of a vehicle stop, arrest and initial detention on or about June 28, 2006. (Docket No. 7, Decision and Order.) Plaintiff has filed an amended complaint. (Docket No. 8.)¹

¹The original complaint was dismissed without prejudice pursuant to *Heck v. Humphrey*, 512 U.S. 477, 484 (1994), inasmuch as the gravamen of the claims was that plaintiff's arrest and subsequent conviction were in violation of his constitutional rights. (Docket No. 4, Decision and Order.) That Order also noted, however, that while there were facts alleged in the complaint that could arguably state a claim of excessive force during the arrest and initial detention, the facts "were so attenuated to the underlying claim" that it "was not clear that plaintiff intended to raise them as a separate claim from those affirmatively pled." (*Id.* at 5.) Plaintiff was advised that if he wished to raise an excessive force claim he would need to do so by filing a separate action. (*Id.*) Plaintiff filed a separate action, *Kirkwood v. Wilkinson, et al.*, 08-CV-0592Sc, but it was dismissed without prejudice due to his failure to comply with an order to file a supplemental application to proceed *in forma pauperis*. (*Id.*, Docket Nos. 3-4.)

Plaintiff later filed a motion for leave to file an amended complaint in the instant action, which the Court construed as a motion to reopen and for leave to file an amended complaint, and granted but only with respect to his claim of excessive force. (Docket No. 7.)

Accordingly, the Clerk of the Court is directed to cause the United States Marshals Service to serve the summons and amended complaint (Docket No. 8), this Order and the prior Orders in this action (Docket Nos. 4 and 7) upon the named defendants without plaintiff's payment therefor, unpaid fees to be recoverable if this action terminates by monetary award in plaintiff's favor.

Pursuant to 42 U.S.C. § 1997e(g)(2), the defendants are directed to answer the complaint.

SO ORDERED.

S/ MICHAEL A. TELESKA
MICHAEL A. TELESKA
United States District Judge

Dated: November 19, 2010
Rochester, New York